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In The

# Supreme Court of the United States

ALEX B. PARK,

*Petitioner*,

v.

STATE OF WISCONSIN,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Respondent believes the questions presented by this case are more accurately stated as follows:

1. Did the affidavit in support of the search warrant provide the issuing magistrate with a substantial basis to conclude that Alex Park might have purposely viewed, and thus knowingly possessed, images of child pornography because he purchased a membership in a fee-based, members-only website the affidavit described as harboring an extensive collection of child pornography?

2. Did the passage of two years — from Park's purchase in May 2003 of a membership in a fee-based, members-only website, which contained an extensive collection of child pornography, until the application for search warrant in June 2005 — preclude the magistrate from concluding that evidence relevant to Park's knowing possession of child pornography might still be found on his computer?

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## JURISDICTIONAL STATEMENT

Park seeks review by writ of certiorari of a Wisconsin Court of Appeals decision issued August 4, 2009. *State of Wisconsin v. Alex B. Park*, No. 2008AP2403-CR, (Wis. Ct. App. August 4, 2009) (Pet-Ap. 1). The Wisconsin Supreme Court denied discretionary review on December 14, 2009 (Pet-Ap. 73). The case involves application of the Fourth Amendment of the United States Constitution as applicable to the States through the Fourteenth Amendment. This Court has jurisdiction under 28 U.S.C. § 1257.

## STATEMENT OF THE CASE

Respondent State of Wisconsin agrees with Park's Statement of the Case. The State also notes that it filed in the Wisconsin Supreme Court a cross-petition for review that presented this question:

> "*Franks v. Delaware*, 438 U.S. 154 (1978), requires a defendant to make a substantial showing with reliable statements of witnesses that information in an affidavit supporting a search warrant is false before that defendant is entitled to a hearing. Is a defendant who successfully makes a substantial showing limited to presenting evidence on the portion of the warrant affidavit for which the showing was made?"

The State does not advance this question in this Court.

## ARGUMENT

### REASONS FOR DENYING THE WRIT

### I. NEITHER THE WISCONSIN COURT OF APPEALS' DECISION IN THIS CASE NOR THE FEDERAL CASES ON WHICH THE COURT OF APPEALS RELIED MISSTATE OR MISAPPLY THIS COURT'S CASES APPLICABLE TO SEARCH WARRANTS.

#### A. The Principles This Court Applies To The Review Of Search Warrant Affidavits.

The task of a magistrate issuing a search warrant is "simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "[A]s the very name implies, [the magistrate] deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). "Perhaps the central teaching of [this Court's] decisions bearing on the probable cause standard is that it is a practical, nontechnical

conception." *Gates*, 462 U.S. at 231 (citing *Brinegar*, 338 U.S. at 176). The magistrate may draw reasonable inferences from the evidence presented in the affidavit. *Id.* at 231-32. "'[P]robable cause,' according to its usual acceptation, means less than evidence which would justify condemnation. . . ." *Id.* at 235 (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813)). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision." *Id.*

"Similarly, [this Court has] repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *Id.* at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). "[S]o long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

### B. Park's Petition Misstates Wisconsin Law When He Interprets Wis. Stat. § 948.12(1m) To Require Actively Downloading An Illegal Image.

Both of Park's appeals in the Wisconsin Court of Appeals focused primarily on his claim that the warrant affidavit in his case contained intentionally

knowing, or recklessly made, false or misleading information. *See Franks v. Delaware*, 438 U.S. 154 (1978). Both of the Wisconsin Court of Appeals opinions, therefore, predominately address Park's *Franks* claim.

Park's initial appeal resulted in a remand to the Milwaukee County Circuit Court for an evidentiary hearing. At the hearing, the trial court found that Agent Szatkowski, the agent swearing to the affidavit, "did not intentionally or with reckless disregard of the truth make a false statement in his affidavit; [and] (2) the affidavit did not contain false information . . . ." *Park*, No. 2008AP2403-CR, slip op. ¶ 7 (Wis. Ct. App. Aug. 4, 2009) (Pet-Ap. 4). In the second appeal, the Wisconsin Court of Appeals, after rejecting Park's *Franks* challenge, addressed the question of whether Agent Szatkowski's affidavit in support of his warrant application supplied the issuing magistrate a substantial basis for finding a fair probability that Park violated Wis. Stat. § 948.02(1m) and a fair probability that evidence of his violation would be found on Park's computer. After correctly identifying this Court's standards regarding review of search warrant affidavits, the Wisconsin Court of Appeals sought to apply those standards to the facts contained in the unredacted warrant affidavit at issue in Park's case. *Park*, slip op. ¶¶ 35-38 (Pet-Ap. 19-20). While Park disagrees with the Wisconsin Court of Appeals' conclusion, he cannot seriously challenge the principles it sought to apply.

A major flaw in Park's argument equates the term "download" with the process of actively saving

digital data — in this case, an image — on his computer. *See generally* GIANNINA MARIN, *Possession of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?*, 60 FLA. L. REV. 1205, 1207-08 (2008). "Download" has a broader meaning, however: "In computer networks, to 'download' means to receive data to a local system from a remote system, or to initiate such a data transfer." Wikipedia, http://en.wikipedia.org/ (use "search" feature to search for "download") (last accessed on May 6, 2010). *See also* TechDictionary.com, http://www.techdictionary.com (use "search by term" feature to search for "download") (defining "download" as "[t]o transfer files or data from one computer to another. Every time you instruct your computer system to retrieve your mail, you are downloading your mail to your computer. To download means to receive; to upload means to transmit") (last visited May 6, 2010).

When surfing the web, the broader definition applies to "download" because one's personal computer (the local system) receives digital information from a remote system (the web server on which the web page one visits resides). MARIN, *supra* p. 5, at 1208. This ambiguity in the definition of "download" can lead to misunderstanding the case law interpreting statutes making possession of child pornography illegal — a problem illustrated here by Park's incorrect assumption that a Wisconsin search warrant affidavit must contain facts from which the magistrate may infer that Park *actively* downloaded illegal images.

Under Wisconsin law, a defendant "possesses" an item when "the defendant knowingly had actual physical control" of the item or the item "is under the defendant's control but not directly in his or her physical possession." *State v. Mercer*, 2010 WI App 47, ¶¶ 15-16, ___ Wis. 2d ___, ___ N.W.2d ___, *petition for review filed.*[1] *See also* WIS. JI—CRIMINAL 920 and n.2 (2000) (supplying the definition of "possession"). A person has actual physical control of an image displayed on his or her computer screen. *See* MARIN, *supra* p. 5, at 1212. For this reason, Wisconsin law recognizes that a person can violate Wis. Stat. § 948.12(1m) when a "defendant reache[s] out for [illegal] images. This fits with the definition of constructive possession: the user could save, print or take some other action to control the images, and the user affirmatively reached out for and obtained the images knowing that the images would be child pornography . . . ." *Mercer*, 2010 WI App 47, ¶ 29.

Park's premise that he must actively save an illegal image to violate Wis. Stat. § 948.12(1m) is wrong. *State v. Lindgren*, 2004 WI App 159, ¶ 27, 277 Wis. 2d 851, 687 N.W.2d 60 (holding Lindgren violated Wis. Stat. § 948.12(1m) even though the state's evidence did not show Lindgren actively saved any images; the images were in the computer "cache" described below). It is true that a

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[1] Wisconsin Court of Appeals opinion available online at http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=48502.

saved image found on a computer's hard drive may be a violation of the statute, but it is also true a saved image is evidence of a separate prior violation as described below. TY E. HOWARD, *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files,* 19 BERKELEY TECH. L.J. 1227, 1254 (2004) (describing the "Present Possession" approach and the "Evidence of" approach to analyzing saved images). This is true regardless of whether the individual consciously saves the image.

These two approaches — the "Present Possession" approach and the "Evidence of" approach — create different factual baselines for reviewing a search warrant affidavit. In Park's view, only the "Present Possession" approach suffices — that is, only the present existence of images on his hard drive constitutes possession of illegal images at the time of the search HOWARD, *supra* p. 7, at 1254. Under this approach, Park argues that the affidavit contained neither facts claiming he actively downloaded and saved illegal images nor facts from which the magistrate could infer he actively downloaded and saved illegal images.

In the State's view, by contrast, images recovered from Park's computer hard drive constitute not only "present possession" of the saved image, but "evidence of" his prior possession when he reached out for, obtained and viewed illegal images.

Thus, the facts necessary to provide a magistrate with a substantial basis for finding a fair probability that evidence of a violation of Wis. Stat. § 948.12(1m) would be on Park's computer are

different under this "Evidence of" approach. To understand why, some technical explanation is necessary.

### C. Technical Aspects Of Computer Web Surfing And Downloading As Bearing On Park's Search Warrant Affidavit.

A saved image can be recovered by forensic examination of one's hard drive. HOWARD, *supra* p. 7, at 1232-36. When someone uses a web browser to access the web, the images viewed while browsing may be saved in two ways. First, a person can affirmatively save the image — that is, create on the computer a new file that is a copy of the digital image. MARIN, *supra* p. 5, at 1211. Second, when someone visits a website, the computer (or, more accurately, the web browser) saves all of the data from a visited web page as temporary internet files (TIFs) stored in a directory known as a "cache." MARIN, *supra* p. 5, at 1213; HOWARD, *supra* p. 7, at 1229-31. These "cached" saved images are saved automatically, without any affirmative act by the computer user.

If a defendant actively saved the illegal image, the evidence of such an image recovered from a hard drive proves physical possession. But under Wisconsin law, "knowing" possession is necessary to establish possession violating the statute. *Mercer*, 2010 WI App 47, ¶¶ 15-16; WIS. JI—CRIMINAL 920 and n.2. (2000). The proof issue for the State in establishing a "present possession" offense focuses

on whether the defendant had not only physical possession but knew of that physical possession. Perhaps the defendant saved the image without first viewing it on the computer screen, in which case something more than finding the image on the computer's hard disk would be necessary to convict.

But that proof issue does not matter from the standpoint of a search warrant because police need not establish a *prima facie* case. *Gates*, 462 U.S. at 235. The saved image is relevant to the investigation and prosecution of possession of child pornography. It is part of the overall proof of a violation. Park appears to recognize as much when he argues the search warrant affidavit did not provide "individualized evidence" that he saved illegal images.

By contrast, when a person actively retrieves illegal images from a website and views them on a computer screen, there is little doubt that the person not only physically possesses the image, but is (or should be) aware of the illegal nature of the image. But when the defendant shuts down the computer or goes to a different site (say, one without illegal images), his or her possession of the displayed image (as opposed to any saved image) ends. The proof issue for the State in this circumstance is establishing that the defendant did actually knowingly possess the image by displaying it on the screen at some time in the past. Again, however, police need not establish a *prima facie* case, and a saved image, whether affirmatively saved or saved by the web browser automatically, provides some evidence that implies prior possession.

This is why the temporary internet files (TIFs) and the "cache" become important to investigations of possession of child pornography. As noted above, the computer browser automatically saves all of the data from web pages visited, including copies of any illegal images contained on those web pages. MARIN, *supra* p. 5, at 1213; HOWARD, *supra* p. 7, at 1229-31. While the automatic nature of the cached image in the TIFs make the "knowing" element of possession more difficult to prove for "cached" images (the present possession analysis), the automatic creation of TIFs also provides a fact from which a magistrate can infer that evidence of past retrieval and viewing of illegal images will exist on a computer at the time of a later search where there is a fair probability a person has "merely accessed" a website containing illegal images (the "evidence of" analysis).

### D. The Legal And Technological Principles Applied To The Affidavit In Park's Case.

This case presented to the Wisconsin Court of Appeals the initial question of whether a membership in a fee-based, members-only website containing an extensive collection of illegal images provides a substantial basis for a magistrate to conclude there is a fair probability that the member "'purposefully searche[d child pornography] out on the [I]nternet,' 'intentionally view[ed] it,' and could control it." *Mercer*, 2010 WI App 47, ¶ 28 (quoting *Commonwealth v. Diodoro*, 970 A.2d 1100, 1107 (Pa. 2009)).

Park claims there was no "individualized" evidence to provide a substantial basis to conclude he intentionally viewed and could control child pornography images. But Agent Szatkowski's affidavit established all of the following facts:

- "Regpay" a company in Belarus, operated a members-only internet website (Pet-Ap. 86-87, ¶ 20).
- "Regpay" sites were fee-based (Pet-Ap. 87, ¶ 21).
- "Regpay" sites advertised child pornography (Pet-Ap. 87, ¶ 21).
- Federal agents purchased memberships and confirmed that "Regpay" sites contained child pornography (Pet-Ap. 87, ¶ 21).
- "darkfeeling.com" was a "Regpay" site (Pet-Ap. 88, ¶ 24).
- Federal agents purchased a one month membership to "darkfeeling.com" for $57.90 (Pet-Ap. 89, ¶ 30).
- Federal agents confirmed that "darkfeeling.com" contained an extensive collection of child pornography (Pet-Ap. 88-89, ¶ 26).
- Park purchased a membership in "darkfeeling.com" (Pet-Ap. 88, ¶ 24).
- Park used a credit card to purchase his membership (Pet-Ap. 89, ¶ 29).

- Park supplied his e-mail address (e-mail address omitted in printing)[2] to "Regpay" (Pet-Ap. 88, ¶ 24).
- The e-mail address (address omitted in printing) was active (Pet-Ap. 91, ¶ 31).
- Park supplied his home address (address omitted in printing) to "Regpay" (Pet-Ap. 88, ¶ 24).
- The e-mail address (address omitted in printing) was associated with the home address (addresses omitted in printing) (Pet-Ap. 91, ¶ 31).
- Park received mail and utilities at his home address (address omitted in printing) and his operator's license also showed that address (Pet-Ap. 91, ¶¶ 32-34).

The facts here were individualized to Park. The affidavit established that Park paid to belong to the "darkfeeling" website, a website whose very name indicates the nature of its content. The website advertised and federal agents confirmed it contained illegal images of child pornography. Park used a credit card associated with his home address, and gave an e-mail address linked to him in purchasing a membership. One-month memberships to the "darkfeeling" website cost $57.90. It is fair to infer that Park purposefully searched for the "darkfeeling" website. There is a fair probability, given these facts,

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[2] The Respondent, like the Petitioner, omits Park's e-mail and home addresses although both the e-mail and home addresses appear in the underlying state court record.

that Park intentionally viewed and had the ability to control some of the illegal images on the site.

Park faults the Wisconsin Court of Appeals for concluding that the above facts presented the issuing magistrate with a substantial basis for determining that there was a fair probability that Park intentionally viewed and possessed illegal images. He points first to cases involving Operation Candyman, an eGroup to collect and distribute child pornography. *United States v. Froman*, 355 F.3d 882, 885 (5th Cir. 2004); *United States v. Martin*, 426 F.3d 68, 70 (2d Cir. 2005). There are some aspects of eGroups that differ from the facts in Park's case, however. The Candyman eGroup was free of charge, *Froman*, 355 F.3d at 885, while a one-month membership in "darkfeeling" cost $57.90 (Pet-Ap. 89, ¶ 30). The Candyman eGroup provided each member e-mail delivery options; members could receive all of the e-mails, a daily summary, or no e-mails. *Froman*, 355 F.3d at 885. The affidavit here does not indicate such options were available to Park, but a warrant application need only show facts establishing probable cause. *United States v. Smith*, 581 F.3d 692, 695 (8th Cir. 2009). This Court's *Franks* holding applies to omissions as well as misrepresentations, allowing a defendant to challenge an affidavit by showing that the affiant intentionally or recklessly omitted material information. *Smith*, 581 F.3d at 695; *United States v. Kapordelis*, 569 F.3d 1291, 1309 (11th Cir. 2009); *United States v. Williams*, 737 F.2d 594, 604 (7th Cir. 1984). Park presented no evidence at the *Franks* hearing to establish he had options in this case.

Rather, Park appears to make the remarkable claim that it is unreasonable to infer that having paid $57.90 for an exclusive membership, he would view the images on the site.

Park claims that *Froman*, *Martin*, and the Ninth Circuit *en banc* decision in *United States v. Goude*, 440 F.3d 1065 (9th Cir. 2006), establish principles that violate the Fourth Amendment. To the contrary, those cases apply the common sense, nontechnical approach based on the totality of the circumstances this Court has required since *Gates*. Park's contention — that establishing that he purchased a membership in a fee-based, members-only site advertising illegal images of child pornography does not provide a substantial basis to conclude that there is a fair probability that he violated Wis. Stat. § 948.12(1m) (or its Federal counterpart) — relies on a "library analysis by scholars," not an analysis "as understood by those versed in the field of law enforcement." *Gates*, 462 U.S. at 232.

## II. THE AFFIDAVIT IN PARK'S CASE PROVIDED THE MAGISTRATE A SUBSTANTIAL BASIS TO CONCLUDE THAT A FAIR PROBABILITY EXISTED THAT EVIDENCE OF HIS EARLIER VIOLATION OF WIS. STAT. § 948.12(1M) WOULD BE FOUND ON HIS COMPUTER.

The remaining question Park's case presented to the Wisconsin Court of Appeals was whether the

warrant affidavit provided the issuing magistrate a substantial basis to conclude there was a fair probability that in 2005, evidence of Park's likely illegal possession of child pornography in 2003 would be found on his computer.

> "[T]he facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past").

*United States v. Grubbs*, 547 U.S. 90, 95, n.2 (2006) (quoting *United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993)). *See also Sgro v. United States*, 287 U.S. 206, 210-11 (1932).

While the recency of the information contained in a search warrant application is one factor bearing on the question of probable cause, there is no bright line for declaring information too stale. *United States v. Prideaux-Wentz*, 543 F.3d 954, 958 (7th Cir. 2008). "[T]he lapse of time is least important when the suspected criminal activity is continuing in nature and when the property is not likely to be destroyed or dissipated." *United States v. Lemon*, 590 F.3d 612, 614 (8th Cir. 2010) (quoting *United States v. Horn*, 187 F.3d 781, 786 (8th Cir. 1999)).

Agent Szatkowski's affidavit supporting his warrant application stated the following facts directly addressing the passage of time from Park's

active membership in the "darkfeeling" website to the time of the warrant application:

- Viewing online digital images automatically downloads that image to a computer's hard drive (Pet-Ap. 84, ¶ 15);
- Forensic examination of a hard drive can identify and retrieve images even if the images have been deleted by the computer operator (Pet-Ap. 84, ¶ 15);
- Individuals who are involved with child pornography are unlikely to ever voluntarily dispose of the images (Pet-Ap. 84-85, ¶ 18).
- Prior cases involving the same Operation Falcon resulted in recovered illegal child pornography images up to two years beyond the last known access to a website containing illegal child pornography (Pet-Ap. 85-86, ¶ 19).

As noted above, "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *Gates*, 462 U.S. at 236 (quoting *Spinelli*, 393 U.S. at 419). This deference reflects a preference for the warrant process because it encourages "recourse to the warrant procedure . . . ." *Id. at 237.*

The affidavit in this case provided the issuing magistrate a substantial basis to believe Park's computer would still contain evidence of his intentional viewing in 2003. Although the affidavit

did not refer to TIFs or the cached images as such, it did recite that the computer "automatically downloads" viewed images "to a computer's hard drive" and that forensic examination could retrieve images "even if the images [had] been deleted by the computer operator." The affidavit additionally set out the proclivity of child pornographers to hoard their images. And lastly, the affidavit recited specific instances of forensic examinations recovering images as much as two years after the last know access to a website containing child pornography.

In view of the deferential standard employed in the review of the issuance of a search warrant, the issuing magistrate had a substantial basis to believe that a forensic examination of Park's computer would produce evidence of his probable violation of Wis. Stat. § 948.12(1m) in 2003.

## III. IF THIS COURT ACCEPTS REVIEW OF THE WISCONSIN COURT OF APPEALS DECISION IN THIS CASE AND DETERMINES THAT PROBABLE CAUSE EXISTED FOR PARK'S VIEWING CHILD PORNOGRAPHY BUT THE INFORMATION WAS "STALE," IT MUST ADDRESS WHETHER GOOD FAITH UNDER *UNITED STATES V. LEON* EXISTED.

The Wisconsin Court of Appeals had no occasion to address the good faith doctrine of *United States v. Leon*, 468 U.S. 897 (1984). The court determined

that Agent Szatkowski's affidavit supporting the warrant application provided the issuing magistrate with a substantial basis to believe there was a fair probability that evidence of Park's intentional viewing of child pornography would be found on his computer. This determination obviated the need to address the *Leon* good-faith exception.

If this court agrees that Agent Szatkowski's affidavit supporting his warrant application provided the issuing magistrate with a substantial basis to believe there was a fair probability that Park's intentionally viewed child pornography but that the passage of time negated a substantial basis to believe evidence of Park's violation of Wis. Stat. § 948.12(1m) would still be found in 2005, the Court must then determine whether *Leon's* good-faith doctrine applies here. Notably, *Leon* itself involved stale information. *Leon*, 468 U.S. at 904-05.

## CONCLUSION

For the reasons discussed above, respondent State of Wisconsin requests that this Court deny the petition for writ of certiorari to the Wisconsin Court of Appeals.

Respectfully submitted,

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